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U.S. Funds and Europe:
The New Dawn

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U.S. Funds and Europe: The New Dawn

Executive Summary

As of July 2013, the Alternative Investment Fund Managers Directive will regulate the marketing of funds in the European Union (EU). Non-EU managers marketing non-EU funds in Europe will be able to rely on private placement rules until at least July 2018, however, the existing private placement rules are likely to be revised in the light of the Directive.

In addition to complying with private placement requirements, the manager must either provide, or ensure that the fund provides, extensive information to investors and regulators prior to, and during the period of, investment.

The Directive applies to all types of alternative funds including hedge funds and private equity funds.

Introduction

As is now widely known, the provisions of the Alternative Investment Fund Managers Directive ("the Directive") will regulate the marketing of both closed-ended and open-ended funds within the EU's borders. Beginning July 2013, the Directive replaces a largely permissive marketing regime, based on local law and investor appetite, with a heavily regulated regime under which a manager may only market a fund to EU investors if that manager is authorized by a relevant EU regulator or, in certain circumstances, if it complies with the relevant Member State's private placement regimes, as amended by the Directive.

The focus of this article is on the rules governing the access to EU investors for U.S.-based managers. For these purposes, a U.S. manager is an investment advisor established and located in the United States and a non-EU fund is a fund that is established outside of the European Union. For reasons of simplicity, the article does not generally deal with the situation where a U.S. manager manages an EU-established fund, such as a Luxemburg SIF Further, a separate article will consider the impact on subsidiary offices and branch offices maintained in the EU by U.S. managers.

Private Placements under the Directive

Although the Directive introduces the concept of an EU-wide passport for EU-based funds managed by EU managers, whereby a manager can market its funds to professional investors across the Member States of the EU on the back of an authorization in a single Member State, this concept has not yet been extended to non-EU managers (or to non-EU funds managed by EU managers). Accordingly, U.S.-based managers looking to actively market a U.S. or Cayman Islands fund to a European investor are required to use the revised private placement regime under the Directive.

Article 42 of the Directive provides that if a non-EU fund (e.g., Cayman Islands) is managed by a non-EU manager (e.g., a New York-based hedge fund manager), then provided that: (a) co-operation agreements are in place between the EU Member States where the fund is marketed and each of the U.S. and the Cayman Islands, (b) neither the U.S. nor the Cayman Islands is on the FATF blacklist for anti-money laundering or terrorism, and (c) the manager complies with the transparency and reporting provisions of the Directive (Articles 22, 23 and 24), the fund can be privately placed to professional investors within the EU.

In addition, certain funds that acquire substantial stakes in EU companies are also required to comply with supplemental reporting requirements in relation to such transactions (Articles 26 to 30). These sections are of particular importance to private equity funds active within the European Union.

Definition of Professional Investor

A "professional investor" is defined as an investor that either is considered to be a professional client or is, on request, treated as a professional client within the meaning of the financial markets framework directive, colloquially known as "MiFID." The U.K. definition is set out in Appendix A hereof.

Note that it is possible that investors previously considered appropriately qualified under relevant private placement rules may no longer be regarded as a "professional investors" under MiFID. While institutions such as investment firms, banks, insurers and pension funds will qualify as professional, other firms and individuals that are currently treated as professional fund investors will not meet the restrictive criteria to qualify as professional under the Directive. In particular, funds will not be able to treat a prospective investor as professional solely on the grounds of the investor's knowledge, experience and ability to understand the risks involved.

Restrictions on Private Placement

Most managers who currently market in the EU are aware that there is no pan-European private placement regime. Instead, managers are required to comply with complex and occasionally baffling private placement legislation in each Member State prior to and during the marketing of their funds. Under the Directive, Member States may render their existing private placement rules more restrictive than present, over and above the requirement to make such rules consistent with the applicable requirements of the Directive, although we are not aware that any Member State currently has plans to do this.

Timing

The Directive, and with it the marketing rules, will come into force in July 2013. In July 2015, the Commission is required to review the passporting provisions of the Directive and, if thought fit, recommend that the passport be extended to non-EU managers marketing their funds within the EU, provided that, among other things, the relevant manager is fully authorized under the Directive. At that stage, the local private placement regimes, as varied by the Directive, will remain.

In July 2018, a second threshold date is reached. At such time, and on the advice of the European Securities and Markets Authority (ESMA), the newly formed European financial regulator, the Commission may decide to "switch off" the national private placement regimes, leaving non-authorized U.S. managers with limited choices when it comes to marketing within the EU.

Reverse Solicitation

The Directive is clear that the current practice of "reverse solicitation," whereby a professional investor established in the EU may invest in funds on its own initiative, irrespective of where the manager and the fund are established and operated, may be continued. This is consistent with current regulation in France and Italy.

The Transparency and Reporting Requirements

In order to make a legitimate private placement under Article 42 (as described above), the manager must either provide, or ensure that the fund provides, extensive information to investors and regulators prior to and during the period of investment.

Article 22 – Annual Report

The manager must provide on request to investors and make available to its "Home Member State" an annual report for each fund that it manages within six months of the end of the year. The concept of the Home Member State is discussed below. Much of the information will already be contained in a Cayman Islands fund's annual report. The report must contain a balance sheet, an income and expenditure account, a report on the fund's activities, and a description of the material changes (if any) to the information disclosed to investors prior to investment. The accounting information must be audited and the full auditor's report should also be included.

One major development is that the manager must provide the following information to the fund for inclusion in the annual report: the total amount of remuneration paid by the manager to staff (split into fixed and variable remuneration); the total amount of any carried interest paid by the fund (it is not yet clear whether carried interest extends to performance

allocations or fees); and the aggregate amount of remuneration broken down by senior management and members of staff of the manager whose actions “have a material impact on the risk profile” of the fund. For EU managers, this disclosure is not too far from the current situation. In the U.K., for example, limited liability firms are required to publish accounts which include a general breakdown of compensation paid. In the U.S. this is a major deviation from the norm and it is unclear how acceptable it will be to managers.

Article 23 – Disclosure to Investors

Prior to investment, each investor is required to be given such information as will allow it to make a qualified assessment of the nature of its investment. For the majority of funds, we would expect the information to be set out in the relevant offering document as is the current practice. It does, however, require that the offering document be updated on a more regular basis than has perhaps been the market norm for the alternative fund industry.

The following items need to be provided to investors prior to investment —

Article 23 Item	Akin Gump Comments
(a) a description of the investment strategy and objectives of the fund, where the fund and any master fund are established, if the fund is a fund of funds, a description of the types of assets in which the fund may invest, the techniques it may employ and all associated risks, any applicable investment restrictions, the circumstances in which the fund may use leverage, the types and sources of leverage permitted and the associated risks, any restrictions on the use of leverage and any collateral and asset reuse arrangements, and the maximum level of leverage	*Many of the requirements in section (a) are non-controversial and are consistent with current market practice. There are extensive ongoing discussions as to how the level of leverage should be calculated; the final decision resting with the Commission. ESMA has recommended to the Commission that managers must calculate the level of leverage as a ratio of exposure in relation to NAV. However, the requirements provide some flexibility with regards to how to calculate exposure, suggesting three possible methods: a gross method, a commitment method, and what it calls the "advanced method." In general, the gross exposure method is calculated as the absolute value of all positions plus the market value of the equivalent underlying position for derivatives. The commitment method is similar to the latter but allows for some netting and hedging arrangements to reduce the exposure. This method is based on the UCITS method. The advanced method is more flexible and allows for further offsetting positions and the use of maximum loss measures. This method is likely to be used by sophisticated managers.*
(b) a description of how the fund may change its investment strategy or investment policy	*This power is commonly retained by the directors or GP of the fund, not the investors.*
(c) a description of the main legal implications of the contractual relationship entered into for the purpose of investment, including information on jurisdiction, on the applicable law and on the existence or not of any legal instruments providing for the recognition and enforcement of judgments in the territory where the fund is established	*It is unclear what the precise meaning of this section is. We would presume that it would be appropriate to include in the PPM a summary of the memorandum and articles of the fund plus a summary of law and taxation applying to the fund in the jurisdiction where the fund is established.*
(d) a description of the service providers, their duties and the investors' rights	*Presumably, this means the rights individual investors would have against each service provider. Currently, there are limited circumstances where an individual investor would have a direct right against a service provider to the fund. The Directive indicates that this may no longer be the case, particularly with regard to the manager and the Depositary.*
(e) whether the manager has professional indemnity insurance against liability arising from professional negligence	*This links to the new capital requirements for managers within the full scope of the Directive (Article 9(7)). For non-EU managers, who are out-of-scope of the Directive, there is no requirement for such insurance.*
(f) a description of any delegated management function and of any safe-keeping function delegated by the depositary, the identification of the delegate and any conflicts of interest that may arise from such delegations	*For EU managers within the full scope of the Directive, delegation is rigorously controlled. In addition, the use of sub-custodians is also subject to certain strict limitations. In both cases, the rules governing delegation in Article 20 of the Directive will not apply to U.S. managers of non-EU funds who remain out of scope.*
(g) a description of the valuation procedure, including the methods used in valuing hard-to-value assets	*The extensive rules relating to valuation contained in Article 19 of the Directive do not extend to funds managed by managers who are out-of-scope.*

Article 23 Item	Akin Gump Comments
(h) a description of the liquidity risk management, including the redemption rights both in normal and in exceptional circumstances	*The extensive rules relating to liquidity contained in Article 16 of the Directive do not extend to funds managed by managers who are out-of-scope.*
(i) a description of all fees, charges and expenses and of the maximum amounts thereof which are directly or indirectly borne by investors	*Such disclosure is in line with market practice in any event.*
(j) a description of how the manager ensures a fair treatment of investors and, whenever an investor obtains preferential treatment or the right to obtain preferential treatment, a description of that preferential treatment, the type of investors who obtain such preferential treatment and, where relevant, their legal or economic links with the fund or manager	*This section links to the giving of side letters by the fund and/or manager. This area of law currently proves controversial and this requirement again serves to underline the care one must take in granting investors a side letter.*
(k) the latest annual report	*See Article 22 – Annual Report above.*
(l) the procedure and conditions for the issue and sale of units or shares	*The definition of "units or shares" would probably extend to the offer of limited partnership interests.*
(m) the latest net asset value of the fund	*Any NAV published in the PPM would quickly become stale. Therefore consideration must be given to the publication of the NAV online or other alternative method. See Article 22 – Annual Report above.*
(n) where available, the historical performance of the fund	*We note the considerable body of law and practice that has built up around the use of past performance as a marketing tool.*
(o) the identity of the prime broker and a description of any material arrangements of the fund with its prime brokers and the way the conflicts of interest in relation thereto are managed and the provision in the contract with the depositary on the possibility of transfer and reuse of fund assets, and information about any transfer of liability to the prime broker that may exist	*The extensive rules relating to the use of a prime broker, in its role as "Depositary" contained in Article 21 of the Directive do not extend to funds managed by managers that are out-of-scope. It is worth noting, however, that due to the strict liability imposed by the Directive on Depositaries, the nature of the product offered by EU-based prime brokers may change in any event.*
(p) a description of how and when information relating to illiquid assets, new arrangements for managing liquidity and risk profile and risk management systems will be disclosed	*Periodically, the manager must disclose to investors the percentage of the fund's assets subject to special arrangements due to illiquidity, new arrangements for managing liquidity and risk profile and risk management systems.* *If the fund uses leverage then the manager must regularly disclose any changes to the maximum leverage (and any rehypothocation arrangements or guarantees) and the total amount of leverage used.*

Article 24 – Reporting Obligations to Competent Authorities

In addition to the information provided to investors as part of the marketing and ongoing general disclosure requirement, a manager must also regularly report to its Home Member State authority "on the main instruments and markets on which it trades" and the "principal exposures and most important concentrations" of the fund's assets. The manager must also report: the percentage of the fund's assets subject to special arrangements due to illiquidity, new arrangements for managing liquidity, the risk profile and risk management systems of the fund, the main categories of assets in which the fund has invested and the results of stress tests relating to the fund's risk and liquidity management.

The manager should also make the annual report and a list of funds managed by the manager available upon request to the Home Member State.

If the fund uses leverage, the manager should also make available information about the level of leverage, the five largest sources of borrowed cash/securities, a breakdown between cash/securities borrowed and leverage embedded in derivatives and the extent to which the fund's assets may have been rehypothecated.

The Home Member State may also require additional information either periodically or on an ad hoc basis in order to effectively monitor systemic risk.

Much of the detail required to successfully analyze the reporting requirements for non-EU managers is currently being created by the European Commission. In particular, since the relevant Articles of the Directive which set out the requirements for the stress tests are not directly applicable to non-EU managers, it is unclear if such requirements apply indirectly by means of Article 24. The wider point of concern for non-EU managers is the extent to which they become indirectly regulated within the EU by virtue of their marketing activities (even if their investment activities are completely unrelated to the EU). There also remains the practical point of how a non-EU manager goes about identifying its Home Member State, given that it is expressly exempt from authorization under the Directive. This is considered further below.

Article 26 – Rules Relating to the Acquisition of Substantial Stakes in EU Companies

If a fund, acting either solely or jointly with other parties, acquires a major holding of a company that has its registered office in the EU then Articles 26 to 30 of the Directive apply. The Directive applies different requirements depending on whether the company is an issuer (being a company whose securities are admitted to trading on an EEA-regulated market or a non-listed company). A non-listed company is one which has no traded securities or has securities admitted to trading on markets that are not EEA-regulated markets (such as the London AIM market). The Directive also includes a carve-out for venture capital investors in that the reporting requirement does not apply where the underlying company is a small- or medium-sized enterprise (i.e., one which employs fewer than 250 people in the EU and has either or both of (a) an annual net turnover not exceeding Eur50m and/or (b) a balance sheet total not exceeding Eur43m).

The Directive imposes disclosure obligations on the acquisition of major holdings (starting at 10 percent of voting rights) in non-listed EU companies. It imposes more onerous obligations on managers whose funds acquire control of EU companies (whether or not listed). There are also requirements designed to prevent "asset stripping" of EU companies controlled by funds.

For a more detailed analysis, please refer to a separate Akin Gump article entitled "Private Equity – Public Excoriation."

In summary, each manager must notify its regulator when its fund's interest in the voting rights of a non-listed company reaches, exceeds or falls below 10 percent, 20 percent, 30 percent, 50 percent or 75 percent. In the event that the fund acquires control of the target then additional reporting requirements apply. In relation to control of non-listed companies, the manager must notify its regulator, the company and any other shareholder whose details are accessible to the manager. This notification must include —

a. the extent of the fund's voting rights
b. the conditions under which control has been obtained, including the identity of the shareholders involved and the persons entitled to exercise voting rights on their behalf
c. the chain of undertakings through which voting rights are held, if applicable
d. the date upon which control was reached.

In addition to the general notification, each manager must also make available to the target and other shareholders its intentions as to the company's future business and give its opinion on the likely repercussions for employees. This information must also be passed to the employees. The manager must also provide its regulator and all investors in the fund with information as to how the acquisition has been financed.

Further disclosure must also be made in the Article 22 Annual Report in relation to entities in respect of which the fund has control. Such disclosures are —

a. a fair review of the development of the company's business over the period covered by the report
b. an indication of important events since the end of the financial year
c. an indication of the company's likely future development
d. details of any acquisitions of own shares.

Additional Points to Consider

Identifying the "Home Member State"

The specific Articles referred to above were written from the point of view of EU managers marketing EU funds within Europe. However, some of the concepts arising out of the particular language do not translate to U.S. managers marketing Cayman Islands funds. In particular, the Directive refers to each manager's "Home Member State." This therefore means that a U.S. manager will have to somehow be adopted by a European regulator for the purposes of compliance with the Directive. Article 42(1)(a) states that the competent authorities for such managers "shall be deemed those of the Member States where the funds are marketed." The natural consequence of this is that funds marketed widely around Europe will be required to report their performance and activity to numerous regulators around Europe. It should also be noted that Article 37 apparently contradicts this provision and suggests that non-EU managers should only have one "Member State of Reference" and that reporting should therefore coordinated through one Member State. It is to be hoped that the Commission resolves the inconsistency at the next stage of legislation.

Prior Approval of Marketing

So far as we are aware, it is not the intention of the European Commission for non-EU managers or non-EU funds to require approval from regulators prior to the commencement of active marketing. In particular, the Directive does not require the delivery of supporting material to the competent authorities prior to any road show. However, we note that Member States are entitled to introduce "stricter rules on non-EU managers in respect of marketing [funds] in their territory." We also note that in all other scenarios, managers are required to identify a Member State of reference and deliver up to them certain material prior to the commencement of marketing and so there remains the strong possibility that the various Member States will require similar material to be delivered up prior to meeting investors in that state.

Extension of the Passport

The European Commission may from July 2015 allow non-EU funds to be marketed in the EU to professional investors via a passport. This will require the manager to comply with the entirety of the Directive. Further, supervisory co-operation arrangements between the supervisory authority of the non-EU manager (most likely the SEC in the case of a U.S. manager) and the competent authorities of the "Member State of Reference" (the EU Member State where it will be authorized) must exist as a condition of the passport being approved.

Use of Marketing Firms

The Directive has included an antiavoidance provision so that investment firms, broker/dealers and placement agents will not be allowed, directly or indirectly, to offer or place funds with EU investors, unless the fund can be marketed under the Directive. It is not clear how this will affect wealth managers based outside the EU (e.g., in Switzerland) managing platforms for EU investors.

EU Managers

For those non-EU funds (e.g., Cayman Islands) that are managed by an alternative investment fund manager established in the EU (in the language of the Directive, an AIFM), all the provisions of the Directive will apply, save for the detailed requirements on each fund's respective depositaries. The extent of the applicable rules will be covered under a separate article.

Exempt Funds

The Directive has adopted a wide-ranging definition of "fund," namely, "collective investment undertakings, including investment compartments thereof," which —

a. raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors; and

b. are not UCITS funds.

The Directive goes on to state that it is of no significance whether the fund is open-ended or closed-ended, whether the fund is constituted under the law of contract, trust law or under statute or has any other legal form.

Although the Directive has some limited exemptions for holding companies, SPVs and pension funds, anything that has a fund-like characteristic should be considered within scope unless and until expressly ruled out. However, it is worth noting that segregated managed accounts, family offices and joint venture vehicles fall outside the scope of the Directive.

Partial Exemption for Small Funds

The Directive does seek, however, to limit the application of the Directive to smaller funds, at least on a partial basis. This exemption is available to managers managing funds with assets under management that in total do not exceed one of the following limits —

a. Eur500m, provided the funds are not leveraged and investors have no redemption rights for the first five years; or

b. Eur100m (including assets acquired through leverage).

The European Commission is currently determining the exemption's scope (for example, how AUM are to be calculated and over what period they should be measured). Any manager that is outside scope would therefore be free to market such funds on the basis of existing, non-Directive-influenced, private placement rules, subject to registration and limited regulatory reporting requirements. Although not entirely clear, it follows that, if a U.S. manager seeking to market a Cayman Islands fund would be able to take advantage of the partial exemption for smaller funds if it were an EU manager, then the same rules will apply to its reporting and marketing. This is of particular importance in relation to the rules relating to the acquisition of EU entities (as described above).

Exemption for Certain Closed-Ended Funds in Run-Off or with a Limited Life

The Directive also includes an exemption for managers that solely manage closed-ended funds that either —

a. make no further investments after the Directive's transposition date (July 2013); or

b. have a life span that will expire within three years from the transposition date (i.e., July 2016) and have closed their subscription period before the Directive came into force (July 2013).

However, a manager that falls into category (b) above will still be required to produce annual reports for the funds and comply with the Directive in relation to substantial acquisitions of stakes in EU companies.

Availability of Co-Operation Agreements

Finally, marketing may take place under Article 42 only in the event that a co-operation agreement is in place between each relevant Member State and both the jurisdiction in which the fund is established and the jurisdiction in which the manager is established. Although jurisdictions such as the Cayman Islands and Guernsey are rushing to put such agreements in place, it is by no means a done deal that the appropriate jurisdictions (including the U.S.) will agree to the provisions by July 2013, particularly since the understaffed ESMA is insistent on leading negotiations rather than leaving it to each of the Member States. It is to be hoped that the situation is quickly resolved.

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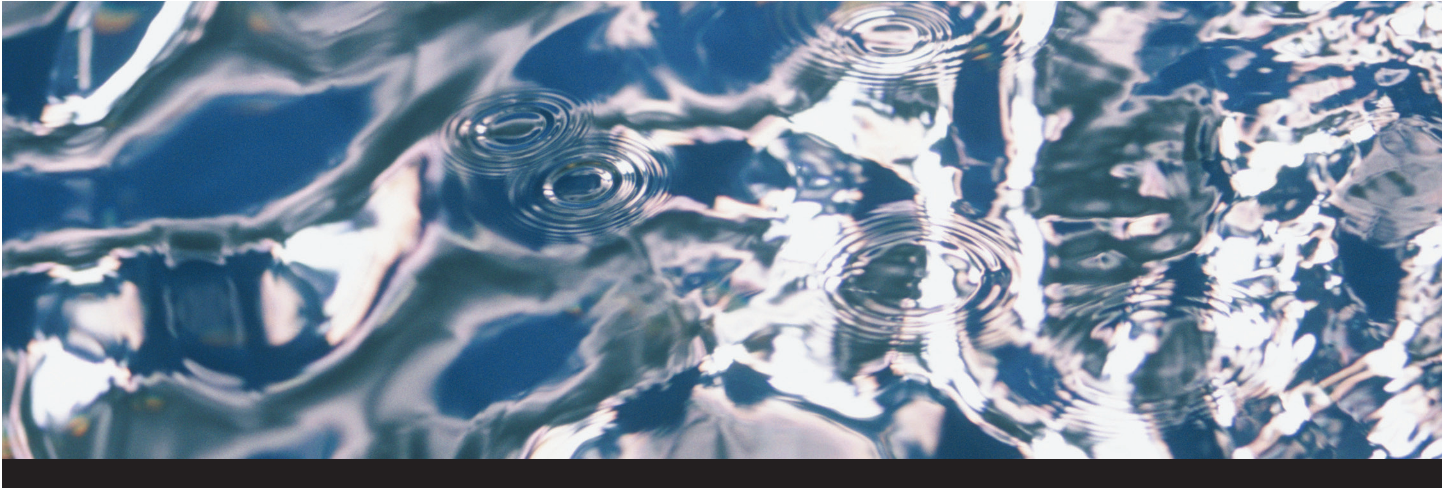

APPENDIX A

Definition of Professional Investor

The following definition is taken verbatim from the Conduct of Business Rules of the U.K. Financial Services Authority (COBS 3.5). It is drawn from the Markets in Financial Instruments Directive (MIFID) (Directive 2004/39/EC).

Definition

COBS 3.5.1 - A professional client is a client that is either a per se professional client or an elective professional client.

Per Se Professional Clients

COBS 3.5.2 - Each of the following is a per se professional client unless and to the extent it is an eligible counterparty or is given a different categorization under this chapter:

(1) an entity required to be authorized or regulated to operate in the financial markets. The following list includes all authorized entities carrying out the characteristic activities of the entities mentioned, whether authorized by an EEA State or a third country and whether or not authorized by reference to a directive:

(a) a credit institution;

(b) an investment firm;

(c) any other authorized or regulated financial institution;

(d) an insurance company;

(e) a collective investment scheme or the management company of such a scheme;

(f) a pension fund or the management company of a pension fund;

(g) a commodity or commodity derivatives dealer;

(h) [a local];

(i) any other institutional investor;

(2) in relation to MiFID or equivalent third-country business, a large undertaking meeting two of the following size requirements on a company basis:

(a) balance sheet total of EUR 20,000,000;

(b) net turnover of EUR 40,000,000;

(c) own funds of EUR 2,000,000;

(3) in relation to business that is not MiFID or equivalent third-country business, a large undertaking meeting any of the following conditions:

(a) a body corporate (including a limited liability partnership) which has (or any of whose holding companies or subsidiaries has) (or has had at any time during the previous two years) called up share capital or net assets of at least £51 million (or its equivalent in any other currency at the relevant time);

(b) an undertaking that meets (or any of whose holding companies or subsidiaries meets) two of the following tests:

(i) a balance sheet total of EUR 12,500,000;

(ii) a net turnover of EUR 25,000,000;

(iii) an average number of employees during the year of 250;

(c) a partnership or unincorporated association which has (or has had at any time during the previous two years) net assets of at least £5 million (or its equivalent in any other currency at the relevant time) and calculated in the case of a limited partnership without deducting loans owing to any of the partners;

(d) a trustee of a trust (other than an occupational pension scheme, SSAS, personal pension scheme or stakeholder pension scheme) which has (or has had at any time during the previous two years) assets of at least £10 million (or its equivalent in any other currency at the relevant time) calculated by aggregating the value of the cash and designated investments forming part of the trust's assets, but before deducting its liabilities;

(e) a trustee of an occupational pension scheme or SSAS, or a trustee or operator of a personal pension scheme or stakeholder pension scheme where the scheme has (or has had at any time during the previous two years):

(i) at least 50 members; and

(ii) assets under management of at least £10 million (or its equivalent in any other currency at the relevant time);

(f) a local authority or public authority.

(4) a national or regional government, a public body that manages public debt, a central bank, an international or supranational institution (such as the World Bank, the IMF, the ECP, the EIB) or another similar international organisation;

(5) another institutional investor whose main activity is to invest in financial instruments (in relation to the firm's MiFID or equivalent third country business) or designated investments (in relation to the firm's other business). This includes entities dedicated to the securitisation of assets or other financing transactions.

COBS 3.5.2A - In relation to MiFID or equivalent third country business a local authority or a public authority is not likely to be a regional government for the purposes of 2 COBS 3.5.2 R (4). In the FSA's opinion, a local authority may be a per se professional client for those purposes if it meets the test for large undertakings in COBS 3.5.2 R (2).

Elective Professional Clients

COBS 3.5.3 - A firm may treat a client as an elective professional client if it complies with (1) and (3) and, where applicable, (2):

(1) the firm undertakes an adequate assessment of the expertise, experience and knowledge of the client that gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved (the "qualitative test");

(2) in relation to MiFID or equivalent third country business in the course of that assessment, at least two of the following criteria are satisfied:

  (a) the client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter over the previous four quarters;

  (b) the size of the client's financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds EUR 500,000;

  (c) the client works or has worked in the financial sector for at least one year in a professional position, which requires knowledge of the transactions or services envisaged;

  (d) (the "quantitative test"); and

(3) the following procedure is followed:

  (a) the client must state in writing to the firm that it wishes to be treated as a professional client either generally or in respect of a particular service or transaction or type of transaction or product;

  (b) the firm must give the client a clear written warning of the protections and investor compensation rights the client may lose; and

  (c) the client must state in writing, in a separate document from the contract, that it is aware of the consequences of losing such protections.

COBS 3.5.4 - If the client is an entity, the qualitative test should be performed in relation to the person authorized to carry out transactions on its behalf.

COBS 3.5.6 - Before deciding to accept a request for recategorisation as an elective professional client, a firm must take all reasonable steps to ensure that the client requesting to be treated as an elective professional client satisfies the qualitative test and, where applicable, the quantitative test.

COBS 3.5.9 - (1) If a firm becomes aware that a client no longer fulfils the initial conditions that made it eligible for categorisation as an elective professional client, the firm must take the appropriate action. (2) Where the appropriate action involves re-categorising that client as a retail client, the firm must notify that client of its new categorisation.

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